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No. 80-1777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID ORGELL, INC.,

Petitioner,

v.

JOSIAH WEDGWOOD & SONS, INC.,

Respondent,

and

GEARY'S STORES, INC., BACCARAT, INC., BUCCELATTI, INC., and CERALENE, INC.,

Defendants.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a claim that thirteen years before the filing of the complaint a non-monopolist manufacturer of a continuously available product engaged in a concerted refusal to deal with a retailer was properly dismissed as barred by the four-year antitrust statute of limitations where the only acts allegedly committed by the manufacturer during the limitations period were simple reiterations of the original refusal to deal.

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PRELIMINARY STATEMENT

Respondent Josiah Wedgwood & Sons, Inc. ("Wedgwood") respectfully prays that this Court deny petitioner David Orgell's ("Orgell") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 19, 1981, affirm-

ing the summary judgment of the United States District Court for the Central District of California entered on January 10, 1979, dismissing, as time barred, petitioner's complaint as against respondent.

Wedgwood adopts the statements of undisputed facts set forth in the petition and in Appendices 1a-3a, 6a-7a and 14a-16a thereof. In essence, Wedgwood, a manufacturer of a line of ceramic products, has always refused to sell that line of products to Orgell. Wedgwood first so refused in 1965, and at all times thereafter has done nothing more than reiterate *precisely* the same refusal to sell.

REASONS FOR DENYING THE WRIT

The courts below correctly applied the established, consistent antitrust principle that the statute of limitations governing such a claim accrues with the last overt act causing injury to plaintiff. Where, as here, the antitrust violation alleged is a refusal to deal which is simply reiterated, the decisions are uniform that the date of the last overt act *causing injury* is the date of the *initial* refusal to deal. Petitioner seeks to obfuscate this plain rule by citing numerous cases which are not on point, in a futile attempt to show a misapplication of law and to manufacture a conflict in the circuits.

In reaching its result in this case—that Orgell's lawsuit is time-barred because the last overt act causing injury was the initial refusal to deal—the Ninth Circuit correctly applied its own precedent and principles enunciated by this Court. In so doing, the Ninth Circuit acted in complete accord with the decisions petitioner cites from the Third, Fifth and Eighth Circuits. As this Court has done on numerous occasions, the Ninth Circuit reaffirmed its recognition of the need for a statute of repose. A plenary review of the ruling below by this Court is unwarranted.

I

THE COURT OF APPEAL, IN AFFIRMING THE GRANT OF SUMMARY JUDGMENT BY THE DISTRICT COURT, CORRECTLY APPLIED ITS OWN PRECEDENT AND THE LIMITATION STATUTE.

The Ninth Circuit correctly applied its own precedent, *In re Multidistrict Vehicle Air Pollution,* 591 F.2d 68 (9th Cir.), *cert. denied,* 444 U.S. 900 (1979), to affirm the District Court's decision that this action is timebarred. In *In re Multidistrict,* a refusal to deal was reiterated during the 4-year limitations period. Yet the Ninth Circuit held that plaintiff's action was time-barred:

> "Nothing in the record indicates other than that the 1964 [time-barred] decisions, as to AMF, were irrevocable, immutable, permanent and final. . . . Acts subsequent to January 10, 1965 [including subsequent refusals to deal] . . . were . . . but unabated inertial consequences of some pre-limitations action." 591 F.2d at 72. (Citations omitted.)

The District Court, whose decision in this case was reached before *In re Multidistrict* was decided, correctly relied upon existing authority from the Ninth Circuit and elsewhere, citing in its opinion *Garelick v. Goerlich's, Inc.,* 323 F.2d 854 (6th Cir. 1963); *Steiner v. 20th Century-Fox Film Corp.,* 232 F.2d 190 (9th Cir. 1956); *Manok v. Southeast Dist. Bowling Association,* 306 F. Supp. 1215 (C.D. Cal., 1969); and *Saunders v. National Basketball Association,* 348 F. Supp. 649 (N.D. Ill. 1972).

In *Garelick v. Goerlich's, supra,* for example, the court stated the rationale for the general rule in affirming a district court's ruling that an antitrust action was time-barred because the action accrued with the initial refusal to deal, and was not renewed by subsequent reiterations thereof:

> "The conduct on these two occasions [reiterations of earlier refusal to deal] might be overt acts but obviously the plaintiffs-appellants were not in any way injured or

damaged thereby. The incidents were simply acts that reflected that defendent-appellee continued in refusing to sell its products to plaintiffs-appellants."

Petitioner bases its entire argument on the assertion that *In re Multidistrict* stands for the proposition that to be time-barred, the initial refusal to deal must destroy petitioner's business. Nothing in that or any other relevant case supports that assertion; indeed, the law is clearly contrary to petitioner's suggestion. *See In re Multidistrict,* 591 F.2d at 72; *Garelick v. Goerlich's, Inc.,* 323 F.2d. 854 (6th Cir. 1963) (initial refusal to deal reiterated to *ongoing* business was time-barred.)

Petitioner asserts that "permanency with respect to refusals to deal clearly does not refer to the emphatic nature of the refusing party' negative response. . . ." Petition, page 8. In fact, permanency with respect to refusals to deal refers to nothing *but* the emphatic and permanent nature of the initial negative response. *In re Multidistrict,* 591 F.2d at 72; *Garelick v. Goerlich's, Inc.,* 323 F.2d 854, 856; C. Hills, *Antitrust Advisor* § 11.13, at 710 (2d ed. 1978).

Petitioner's futile effort to show that the Ninth Circuit misapplied its own jurisprudence as a basis for the petition rests on two Ninth Circuit cases that are factually remote from this case. In *Program Engineering Inc. v. Triangle Publications, Inc.,* 634 F.2d 1188 (9th Cir. 1980), the Ninth Circuit reversed on the issue of the statute of limitations where overt acts *other than* a reiterated refusal to deal were alleged within the limitations period. Similarly, in *Twin City Sportservice, Inc. v. Charles O. Finley & Co.,* 512 F.2d 1264 (9th Cir. 1975), the Ninth Circuit held that a cause of action for *tying* continues to accrue so long as the defendent continues to accept benefits under or assert the validity of an unlawful *tying* arrangement.

Petitioner's failure to comprehend the governing standard likewise emerges from its citation of *Hanover Shoe Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968). In *Hanover Shoe,* defendant did not merely refuse to sell; it

required that machinery be leased instead of bought, it collected rentals on those leases and *it entered into replacement leases* during the limitations period. Its monopolistic conduct injured plaintiff on *both* a continuing basis and under *varied* circumstances of inflicted harm.

Petitioner seeks to justify this petition citing cases that analyze the statute of limitations in other than the refusal to deal-reiterated context. In contrast, the well-reasoned opinion of the Ninth Circuit in this case is properly focused and is supported by its own precedents and those of other jurisdictions. It is not an appropriate subject for review by this Court.

II

THE NINTH CIRCUIT'S APPLICATION OF THE STATUTE OF LIMITATIONS IS HARMONIOUS WITH THE DECISIONS OF THE OTHER CIRCUIT COURTS.

The Fifth, Third and Eighth Circuits have adopted the general rule, and the Ninth Circuit has concurred in this case, in *In re Multidistrict, supra,* and in earlier cases, that a new cause of action accrues with each injurious act committed against an antitrust plaintiff. *Poster Exchange v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976); *Braun v. Berenson,* 432 F.2d 538, 543 (5th Cir. 1970), *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127 (3rd Cir. 1978); *Pioneer Co. v. Talon, Inc.*, 462 F.2d 1106 (8th Cir. 1972).

However, in the refusal to deal setting, courts have required a further analytical step focusing on what constitutes the injurious act. In this case, as with *In re Multidistrict,* the injurious act was the initial refusal to deal.

The above cases cited by petitioner, Petition, p. 10, do not conflict with the rule of the Ninth Circuit because they are not simply refusal to deal cases. Indeed, in one of the Fifth Circuit cases cited by petitioner, the court was careful to distinguish its fact situation from classic refusals to deal. In *Braun v.*

Berenson, 432 F.2d 538 (5th Cir. 1970), it was held that each time a lessee of shopping mall space attempted to lease additional space or move to another location within the mall, but was refused, a new cause of action accrued.

> "The plaintiff and the defendants did not stand in a continuing relationship to each other as *buyer and seller of a product,* as in the classic 'refusal to deal' situation. Moreover, the store spaces sought by the plaintiff were not a continuously available commodity, as were the products involved in the cases relied on by the defendants, but became available only periodically and under uniquely different circumstances, so that even the second refusal to rent . . . was not merely the reiteration of the previous refusal to lease . . . but was a new overt act giving rise to new and independent damages to the plaintiff. . ." 432 F.2d at 543. (Emphasis in original.)

Similarly, *Imperial Point Colonnades Condominium, Inc. v. Mangurian,* 549 F.2d 1029 (5th Cir.), *cert. denied sub nom. Mangurian v. Thompson,* 434 U.S. 859 (1977), concerned not a refusal to deal, but a tying arrangement wherein it was held that the statute of limitations began anew each time rents were collected pursuant to the tied lease, since a different affirmative act was taken by the defendant on each such occasion to reap *additional* benefits from its allegedly anticompetitive actions.

Poster Exchange v. National Screen Service Corp., 517 F.2d 117 (5th Cir.), *cert. denied,* 423 U.S. 1054 (1976), concerned not the simple reiteration of a refusal to deal, but alleged monopolization, monopolistic pricing and exclusion from an entire industry as well. Petitioner nowhere contends that *any* of those special circumstances existed in *this* case; and they obviously alter the analysis significantly since a refusal to deal by a monopolist has effects close to those of a tying arrangement, and has the *purpose* of extending or maintaining a monopoly, over and above the mere desire not to deal.

When confronted with a classic refusal to deal situation outside of the monopoly context, the Fifth Circuit, as noted in *Braun v. Berenson,* 432 F.2d at 543, has ruled, in accord with the Ninth and other circuits, that the relevant injurious act is the initial refusal to deal and the action, if time-barred, remains so despite subsequent reiterations within the limitations period. *See also Southeastern Hose, Inc. v. Imperial-Eastman Corporation,* CCH 1973-1 Trade Cas. ¶ 74, 479 (N.D.Ga. 1973).

In the Third Circuit case cited by petitioner, *Harold Friedman, Inc. v. Thorofare Markets, Inc.,* 587 F.2d 127 (3d Cir. 1978), the court held in a case concerning a refusal to extend a lease that the action was not barred by the statute of limitations because damages were *too speculative* at the time of the initial refusal to extend the lease. Petitioner here has not contended that its damages were too speculative at the time Wedgwood initially refused to deal with it and the cited case is again inapposite. And, of course, *Braun v. Berenson, supra,* recognized the unique character of refusals to *lease,* as contrasted with a refusal to sell the kind of standardized, continuously available product which is at issue in this case.

Pioneer Co. v. Talon, Inc., 462 F.2d 1106 (8th Cir. 1972), *is the only case* cited in Orgell's petition that actually concerns and is limited to a refusal to deal. Yet, it too is entirely consistent with *In re Multidistrict, supra,* and the Ninth Circuit decision in this case. Here, a course of dealing never existed between the parties at *any* time. Therefore, when Orgell initially requested the Wedgwood line and was refused, the injurious act occurred and was complete. Reiteration in no way altered the complexion of the original act or the nature of the blow struck thirteen years before the complaint was filed.

In *Pioneer,* a prior course of dealing had existed between the parties, and expectations had therefore been created. At a point outside the limitations period, an agent of Talon orally announced the policy by which it would no longer supply zippers to Pioneer. The court held that, because of the pre-existing relationship between the parties, an injurious act did not occur until an order was actually placed and was refused by

Talon, which occurred within the limitations period. The announcement of no further dealing could not have caused damage, in the Court's view, because there was then no contract between the parties. "It is . . . clear that even though [the agent] gave notice, it terminated nothing of legal significance." 462 F.2d at 1108. Here, of course, no relationship ever came into being between petitioner and respondent Wedgwood. And the original refusal to deal was confirmed at least once *in writing, unequivocally,* six years before petitioner filed its complaint.

The Circuits are in agreement. A new cause of action does accrue with each *new* injurious act against an antitrust plaintiff. But, where no monopoly or monopolization is claimed, and the injurious act is a simple refusal to deal which is merely reiterated within the statute of limitations period, the injury flows from and is complete with the initial refusal to deal. This is not a "crazy-quilt application of the antitrust laws throughout the nation" as petitioner asserts, Petition, p. 11. It is a logical, careful and consistent application of settled basic rules to a particular situation.

CONCLUSION

This case is not controversial; it is simple, and presents no novel questions of law. The court below applied its own precedents in the only legally correct way to affirm the dismissal of petitioner's time-barred antitrust complaint. Its decision was inevitable if it was to be consistent with the decisions of other Circuits. Had the court below ruled otherwise, in the context of this case, it would have "effectively destroy(ed) the statute of limitations as a statute of peace." *Sherman v. Goerlich's Inc.,* 238 F.Supp. 728, 730 (E.D.Mich. 1963), *cert. denied,* 238 U.S. 830 (1965). For all of the foregoing reasons, respondent Josiah Wedgwood & Sons, Inc. prays that the petition of David Orgell, Inc. for writ of certiorari be denied.

Respectfully submitted,

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